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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825

315 U.S. 799

Schaaf v. S.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

PETITION FOR WRIT OF *CERTIORARI* AND BRIEF IN SUPPORT THEREOF.

JEROME C. EISENBERG,
Attorney for Petitioners,
744 Broad Street,
Newark, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

PETITION FOR WRIT OF *CERTIORARI*.

MAY IT PLEASE THE COURT:

The petition of Helen T. Schaaf, and 89 others* respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The 90 petitioners (whose names are not set out in full for the sake of brevity) are non-borrowing members of the Eleventh Ward Building and Loan Association of Newark, New Jersey (hereinafter termed the Association), a building and loan association organized and doing business under the laws of New Jersey (R. S. Title 17, Chapter 12). The Association instituted proceedings to reorganize pursuant to R. S. Title 17, Chapter 12, Article 15, as amended by P. L. 1939, Chapter 255 (Appendix, p. 15). The peti-

* The other petitioners are enumerated in the Petition of Appeal filed with the New Jersey Court of Errors and Appeals appearing at page 7 of the Record.

tioners filed dissents from the proposed plan of reorganization (which is hereinafter referred to as the Plan and which appears in full at pp. 70-111 of the Record) in the manner provided by the statute. The petitions of dissent are set out in full on pages 20 and 30 of the Record.

The petitions of dissent were filed on June 18, 1940, and June 19, 1940. The Chancellor filed a memorandum (R., pp. 127-133) on July 8, 1940, adjudging the Plan to be unfair and inequitable.

The Association thereupon applied to the trial court for leave to submit proof on certain issues (R., p. 138). The petitioners thereupon requested leave to submit proofs

(a) that building and loan associations, as presently constituted, are not affected with a public interest because the bulk of the mortgages held by them represent loans to non-members and persons who are only technically members who have no substantial investment interest; because the chief source of fresh funds employed by such associations is derived not from contributions by members, but from loans made from governmental agencies; and

(b) that the statute permitting the reorganization of building and loan associations is not enacted to accomplish a public purpose, but affects private rights and relationships only; and

(c) on the value of the assets which are to be pledged to the R. F. C. to secure the $3,000,000 loan so that it may be determined whether the value of the collateral has any reasonable relation to the amount of the loan, and so that it may be determined whether there is any necessity for the making of such a loan; and

(d) that reorganization of Eleventh Ward Building and Loan Association is not in the public interest be-

> cause the community in which it will operate is adequately served by other institutions affording the same facilities for savings and borrowings, and because on reorganization, there would be no outlet for investment of funds which is consistent with the purposes for which building and loan associations are created.

Leave to submit such proofs was denied to the petitioners on July 24, 1940 (R., p. 140).

Limited proofs sought by the Association were taken *ex parte* (R., pp. 157-187 and R., pp. 218-242). Thereafter the trial court reversed itself and decreed the Plan to be fair and equitable with certain minor modifications (R., pp. 253-255), and again denied the petitioners leave to submit proofs.

The petitioners appealed from this decree to the Court of Errors and Appeals of New Jersey, the highest appellate court in New Jersey, which affirmed the decree below (R., p. 275) by an opinion reported in 130 N. J. Eq. 414.

That court considered and decided adversely to the petitioners the contention that the petitioners were not afforded an opportunity to present evidence, thus denying to the petitioners the due process of law guaranteed by the Fourteenth Amendment of the federal constitution.

The claim of constitutional right to a full hearing on the merits of the case was raised before the Court of Errors and Appeals in the petition of appeal (R., p. 13).

The trial court and the Court of Errors and Appeals considered and decided adversely to the petitioners their contention that that part of the statute and that that part of the Plan which provided for the crediting of the book

value of shares pledged to secure mortgage loans against the principal amount of such loans in reduction thereof, violated the Fourteenth Amendment of the federal constitution.

This point was raised by the petitioners in their petitions of dissent (R., pp. 23 and 31) and was also raised in their petition of appeal (R., p. 9).

B.

Reasons relied upon for the allowance of the writ.

1. The New Jersey Court of Errors and Appeals has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court and has decided those questions in deprivation of petitioners' constitutional rights as follows:

(a) It has decided as against a claim of constitutional right under the Fourteenth Amendment that the petitioners were afforded a hearing within the meaning of the Fourteenth Amendment.

(b) It has decided as against a claim of constitutional right under the Fourteenth Amendment that the police power of the state may be invoked to prefer one class of members in a mutual association above others, in the absence of any show of evidence on the reason or necessity therefor.

C.

Prayer for Writ.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of Errors and Appeals of the State of New Jersey, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 239, February Term, 1941, *In the Matter of the Reorganization of the Eleventh Ward Building and Loan Association of Newark, New Jersey;* that said decree of said Court of Errors and Appeals be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioners will ever pray.

All of which is respectfully submitted this 29th day of December, 1941.

HELEN T. SCHAAF, and 89 others.
Petitioners.

By:

JEROME C. EISENBERG,
Attorney.

Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The Opinions of the Courts Below.

The opinions of the trial court were not officially reported. They appear in the Record at pages 127 and 197.

The opinion of the Court of Errors and Appeals is reported in 130 N. J. Eq. 414, and appears in the Record at page 256.

II.

Jurisdiction.

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b) of the Judicial Code, and under Rule 38, paragraph 5 (a) of the Court.

2. The day of the entry of the remittitur and decree of affirmance is October 3, 1941, on which date it was filed in the Court of Errors and Appeals (R., pp. 275, 276). It bears date September 19, 1941, which is the date of the opinion (R., p. 256). This is in accord with the state practice, under which the attorney prepares the remittitur as of the date of the filing of the opinion in the appellate court and files the same without presentation to or order of the Court. It becomes effective on the date when filed.

> *Chambers* v. *Philadelphia Pickling Co.*, 82 N. J. L. 1, 2.

The remittitur bears the endorsement by the Clerk of the Court of Errors and Appeals "Filed Oct. 3, 1941" (R., p. 276).

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237 (b) of the Judicial Code for the following reasons:

(a) The claim of federal constitutional rights in relation to a full hearing was raised on appeal (R., p. 13, par. 5) after the trial court had refused a hearing (R., pp. 140 and 253). The claims were specifically passed upon and denied by the New Jersey Court of Errors and Appeals in its opinion (R., p. 256).

(b) The claim of federal constitutional rights in relation to the credit of share values against mortgage loans in reduction thereof was made in the first pleading filed in the trial court (R., pp. 23 and 31). The same claim was reiterated on appeal (R., p. 9).

4. The cases believed to sustain the jurisdiction are as follows:

Morgan v. *United States,* 298 U. S. 468;
Shields v. *Utah Idaho Central Railroad Co.,* 305 U. S. 177;
Baltimore & Ohio Railroad Co. v. United States, 298 U. S. 349;

which establish that the due process clause assures a full hearing before the Court empowered to perform the judicial function involved, which includes the right to introduce evidence and have judicial findings based upon it.

Treigle v. *Acme Homestead Assn.,* 297 U. S. 189,

establishes that even in connection with institutions affected with a public interest, private rights may not be prejudiced unless the object to be achieved is in fact in the public interest.

III.

Statement of the Case.

An adequate statement of the case is presented under heading "A" of the petition for writ of *certiorari.* In the interest of brevity, the statement is not repeated here.

IV.

Specification of Errors.

1. The Court of Errors and Appeals erred in finding and holding that its refusal to afford the petitioners an opportunity for a full hearing on the merits, was not in contravention of the provisions of the Fourteenth Amendment.

2. The Court of Errors and Appeals erred in finding and holding that the Plan did not deprive the petitioners of property without due process of law.

V.

ARGUMENT.

Summary of Argument.

Point A. The petitioners were deprived of a trial, because there was no hearing, and because they were prevented from introducing evidence material to the issue, and because they were given no opportunity to cross examine witnesses.

Point B. The petitioners were deprived of their property without due process of law, because members of the Association other than the petitioners were preferred over the petitioners.

POINT A.

The petitioners were deprived of a trial.

The statute, R. S. 17:12-106 (Appendix, p. 15), provides that upon filing of the petition of dissent "the court shall hear and dispose of the matter summarily." The statute directs that a hearing be held. The record may be searched in vain for anything bearing the semblance of a hearing. Upon the filing of the petitions of dissent on June 18, 1940, an order was advised, returnable June 25, 1940 (R., p. 28), directing the Association to show cause before the Chancellor "why the court should not make an

order suspending the operation of such Plan *until a hearing may be had on such petition.*" Upon the return day of that order, affidavits were presented by the Association. There was no hearing.

The Court below decided the case on argument of counsel. The Court heard no witnesses. There was no opportunity for cross examination.

The petitioners were entitled to a judicial determination on the facts and issues they raised.

> *Baltimore & Ohio Railroad Co.* v. *United States of America,* 298 U. S. 349.

A "hearing" is "the hearing of evidence and argument".

> *Morgan* v. *United States,* 298 U. S. 468;
> *Shields* v. *Utah Idaho Central Railroad Co.,* 305 U. S. 177.

The language of R. S. 17:12-106 makes it apparent that what was to be avoided was an answer to the petition, other pleadings, orders of reference, and the like. Due process requires a full hearing *(Baltimore & Ohio Railroad Co.* v. *United States, supra).* A trial court should not be permitted to abandon the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. A hearing is designed to afford the safeguard that the one who decides shall be bound in good conscience *to consider the evidence,* to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. See *Morgan* v. *United States, supra.* Upon the filing of the grounds of dissent, it was the trial court's duty to receive and consider the evidence supporting the grounds

and then, and only then, to make its decision. This was recognized in the initial order made by the trial court which required the suspension of the operation of the Plan "until a hearing" could be had on the merits (R., pp. 28, 29); the Court never acted on its order.

POINT B.

The petitioners were deprived of their property without due process of law.

Members of New Jersey building and loan associations are either borrowing or non-borrowing members. When one becomes a borrower on bond and mortgage from a building and loan association upon the pledge of shares, *he becomes a member of the association.*

> *Mechanic's Building and Loan Association* v. *Conover,* 14 N. J. Eq. 219, 224, affirmed, 17 N. J. Eq. 497.

Upon the insolvency of a building and loan association, the entire amount of the mortgage loan falls due, *no credit* being given the member for dues paid in.

> *Weir* v. *Granite State B. & L. Association,* 56 N. J. Eq. 234, and
> *Harris* v. *Nevins,* 68 N. J. Eq. 183, affirmed 68 N. J. Eq. 684.

The borrower is "in the first place, a member, and only in the second place, a borrower."

> *Thirteenth Ward B. & L. Ass'n* v. *Weissberg,* 115 N. J. Eq. 487, 493.

The statute (Title 17, Chapter 12, Revised Statutes) governing the affairs of building and loan associations evidences an intention that complete mutuality and equality characterize all transactions between the association and its members, and between the members *inter se*. The spirit of the statute is equal participation.

Bucsi v. *Longworth B. & L. Ass'n*, 119 N. J. L. 120, 124, 125.

The device adopted by the reorganization statute, and by the Plan, destroys that element of mutuality which was inherent at the inception of membership. It gives borrowing members full credit for dues paid on shares pledged as security for a mortgage loan, without compensating payments to other members. It does not appear that the measure adopted is one upon which the Plan depends for its successful operation. It does not appear that the device is to be applied only in those cases where preservation of the Association's lien and the safety of its investment requires it. On the contrary, it was stipulated that no investigation was made of either the values of the properties securing mortgage loans or the financial responsibility of the mortgage debtors (Exhibit S-4, R., pp. 194-196).

The provision in question affects only private rights. While, in a proper case, constitutional guarantees must yield to a proper exercise of the police power, the end which the legislature seeks to achieve must be in fact public, and the means adopted to attain that end must be reasonably adapted to the purpose of the law. The sole effect of the statute and the Plan is the disturbance of private rights.

Treigle v. *Acme Homestead Ass'n*, 297 U. S. 189.

Whether a statute is in fact enacted for an end which is public is a mixed question of law and fact.

Treigle v. *Acme Homestead Association, supra.*

The petitioners sought to introduce evidence to show that the object sought to be achieved was not in fact public. This they were denied (R., pp. 140, 253).

The petitioners insisted, in the courts below, that they were entitled to their day in court. They insisted that the constitution guarantees them the right, refused them below, to be heard on the factual issue they raised. They insisted that they had the right, refused them below, to adduce evidence to prove that building and loan associations are not in fact institutions vested with a public interest to the extent claimed for them; that they have changed fundamentally in nature since the enactment of the statutes originally intended to govern the conduct of their business; that they have changed so radically that the numerous cases cited to prove that they are institutions affected with a public interest are inapplicable. The petitioners insist that building and loan associations are no longer the *mutual* institutions conducted for *mutual* profit that they set out to be.

The petitioners asked the Court below for the right to introduce the necessary evidence within the issues of the case presented, and the Court refused to take the evidence. Their offer to introduce evidence was made to rebut the assumptions of fact relied upon, without proof, by the Association.

The Court below based its decision in part on the fact that the petitioners represented but a small part of the

total investment (R., p. 260, ll. 30-31). The petitioners had invested about $260,000 (R., p. 144, l. 40). There should not be one kind of due process for minority stockholders and another kind for majority stockholders.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly that a writ of *certiorari* should be granted and this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

Respectfully submitted,

JEROME C. EISENBERG,
Attorney for Petitioners.

APPENDIX.

(R. S. Title 17, Ch. 12, Article 15, as Amended.)

Reorganization.

[17:12-105.] Any building and loan association heretofore or hereafter organized or existing under any law of this state may reorganize in the manner in this article set forth.

[17:12-106.] A reorganization of any such building and loan association effected in pursuance of the provisions of this article shall be made in the following manner:

The board of directors of such association may, at a meeting called for that purpose, adopt a plan of reorganization of such association. Two copies of such plan, signed and acknowledged or proved as in the case of deeds to real property, shall be submitted to the commissioner. If it shall appear to the satisfaction of the commissioner, as a result of an examination or otherwise, that the share liability, creditor obligations, and liability for unpaid taxes of any such association exceeds the fair value of its assets, or if it shall appear to the commissioner that the condition of such association is unsound by reason of its ownership of real property in an excessive amount in proportion to its other assets, or that the aggregate amount of defaulted mortgages held by such association is excessive, and if, in the opinion of the commissioner the plan of reorganization so submitted to him will remedy the situation so found by him to affect such association, or that its adoption will further the interests and will be beneficial to the members and creditors of such association and to the community in which it is located, he shall indorse his approval thereon. One copy, so indorsed, shall be filed in the department of banking and insurance, and the other shall be returned by the commissioner to such association. After such approval, the pro-

posed plan shall be submitted to the members of such association at an annual meeting, or at a special meeting called for the purpose of considering and voting upon such plan. At any such meeting, members may vote in person or by proxy. At least ten days' notice of such meeting shall be given members by mail. A copy of such notice shall at least ten days before such meeting, be published once in a newspaper published in the municipality in which such association has its principal office, and if there shall be no such newspaper, then in one published in the county wherein such principal office is located. If, at such meeting, or any adjournment thereof, a majority of the votes cast are in favor of such plan, a certificate thereof shall be made, signed by the president, or vice president, and secretary or treasurer of such association, and acknowledged or proved as in the case of deeds to real property, and shall be filed in the office of the department of banking and insurance, and thereafter the association may proceed to reorganize in accordance with the provisions of such plan.

All members of such association who shall not have dissented from such reorganization plan in the manner provided by this article, shall be conclusively deemed to have assented thereto. Any member who shall dissent from the proposed plan, shall file a petition of dissent, in writing, in the court of chancery, in a cause to be entitled "In the matter of the reorganization of..... building and loan association," the blank to be supplied with the name of such association. Such petition shall set forth the grounds upon which such member dissents from such plan, and shall be filed in such court at least five days before the day appointed for the meeting of members called to consider and vote upon such plan. No such petition shall be filed unless it shall have indorsed thereon proof of service of a copy thereof upon such association. Upon the filing of such petition, the court shall hear and dispose of the matter summarily, and, if satisfied that the plan is equitable and fair, shall make an order approving the said plan, and

dismissing such petition. Upon the making of such order, the proposed plan shall be binding upon such dissenting member in the manner as if such member had filed no dissent thereto. In the event that such court shall find that the said plan is unfair or inequitable, it shall make an order disapproving such plan, and thereafter such association shall not proceed to reorganize in the manner set forth in such plan, until the further order of such court, or until such order is modified or vacated. No order disapproving any such plan shall be construed as in anywise limiting the power of such association to reorganize in pursuance of the terms of a further or modified plan, in which event all the provisions of this article shall attach and be effective in the same manner as if any prior plan or plans had not been disapproved by such court.

All persons aggrieved by any order of the court of chancery made pursuant to the provision of this article may appeal therefrom to the court of errors and appeals. Any such appeal shall be made within twenty days from the filing of the order appealed from. For the purposes of this section, the term "persons aggrieved" shall include any member who shall file a petition of dissent, the association in reorganization, and the commissioner reorganizing an association pursuant to the provisions of section 17:12-113 of this title.

[17:12-107.] Without limiting the generality of the methods by which an association may reorganize, any plan of reorganization may provide:

a. For reorganization under the existing name of the association or under a different name;

b. For the date upon which the reorganization shall be effective. If the plan fails to fix an effective date, the effective date, shall be the date upon which the proposed plan is approved by the members of the association as set forth in section 17:12-106 of this Title. Where a petition of dis-

sent has been filed pursuant to section 17:12-106 of this Title, and the Court of Chancery has made an order approving the plan, the date of the order shall be the effective date of reorganization, unless the court has, in its order, fixed a date upon which the plan shall be effective, in which event the date so fixed shall be the effective date of reorganization;

c. For the crediting of the book value of shares pledged to secure mortgage loans against the principal amount of such loans, in reduction thereof;

d. For the cancellation of or the postponement of notices of withdrawal on file with the association, for a period not to exceed two years from the effective date of reorganization;

e. For the transfer of such assets, including real estate and defaulted bonds and mortgages, as may be determined by the board of directors with the approval of the commissioner, to a corporation organized pursuant to section 17:12-109 of this Title for the sole purpose of liquidating such assets in an orderly manner;

f. For the transfer of such assets, including real estate and defaulted bonds and mortgages, as may be determined by the board of directors with the approval of the commissioner, to a "participating reserve" account to be set upon the books of the association for the purpose of liquidating such assets in an orderly manner;

g. If the association shall make a transfer of assets as authorized by paragraphs "e," "f," or "j" of this section, any part of the reserve accounts of the association as shall be set forth in the plan of reorganization may be either charged off against the value of the assets so transferred, or transferred together with such assets to such corporation, participating reserve account, or association created to receive such assets, as the plan of reorganization shall provide;

h. For the reduction of the share liability of the association to its members to the extent required to meet actual or anticipated losses and to create a reserve for such purposes;

i. For the manner in which expenses of reorganization shall be paid;

j. For the transfer of such sound or liquid assets, including bonds and mortgages in good standing, as the board of directors shall determine with the approval of the commissioner, to a building and loan association to be organized pursuant to the provisions of section 17:12-109.1 of this Title, or to an association already organized or to be organized pursuant to said section 17:12-109.1 by another building and loan association in reorganization pursuant to this article. Upon such transfer, the reorganizing association shall, without further act of its members, directors, or officers, other than the filing of the certificate hereinafter mentioned, continue as an association for the sole purpose of effecting the plan of reorganization adopted. A certificate by the association certifying that it has made the transfer of assets authorized by this paragraph, and that thereafter the purposes of the association are limited to carrying out the plan of reorganization, shall be recorded in the office of the clerk of the county wherein the association has its office, and after being so recorded, shall be filed in the office of the commissioner. Thereafter, the existing constitution of the association, as modified by the aforesaid certificate and the plan of reorganization, shall determine and regulate the powers and conduct of the business of the reorganizing association. In addition to such powers as may be conferred upon the association by its constitution, as modified by the aforesaid certificate and plan of reorganization, the association shall possess all the powers necessary or convenient to accomplish an orderly liquidation of the assets retained by it pursuant to the plan of reorganization, including, by way of description and not by way of

limitation, power (a) to borrow money, from any source whatsoever, whether within or without the State, without limitation as to amount, and upon such terms and upon such security as the board of directors shall determine; (b) to convey its property, real and personal upon terms and for a consideration, cash or otherwise, as the board shall determine; and (c) to defer the payment of the purchase price upon such conveyance and to accept security thereof. The commissioner shall have the same powers of supervision and regulation of the reorganizing association after the transfer of assets pursuant to this paragraph as prior to adoption of the plan of reorganization.

k. For the borrowing, from any source whatsoever, whether within or without the State, of any sums of money necessary or convenient to effect the reorganization, without limitation as to amount, and upon such terms and upon such security as the plan of reorganizing shall provide.

l. For the suspension, for the period beginning with the adoption by the board of directors of a resolution to reorganize the association and ending with the rejection or the going into effect of the plan pursuant to section 17:12-106 of this Title, of payments on account of shares withdrawn and shares matured, and for the segregation by the association, for the same period, of all share dues paid by members, except where such dues are applied in reduction of a debt to the association. If the plan of reorganization becomes effective, the dues so paid shall be credited to the accounts of those members who paid them, without decrease or impairment for any cause. If the plan of reorganization does not become effective for any reason whatsoever, the dues so paid shall, at the option of the members who have paid them, be returned to them in cash or credited to their share accounts without decrease or impairment, except that dues paid by members indebted to the association shall be credited, without impairment, against such indebtedness in reduction thereof.

[17:12-108.] A participating reserve account created in the manner authorized by paragraph "f" of section 17:12-107 of this Title shall be administered by the association for the sole benefit of those members whose share liability has been reduced by reason of the creation of the account. Such members shall receive participating certificates from the association evidencing their pro rata interest in the assets transferred, the aggregate value of which shall equal the value of the assets so transferred. The assets at any time comprising the participating reserve account shall be identified on the books of the association as participating reserve assets and the aggregate book value of such assets shall be reported on any balance sheet of the association. As and when assets transferred to the participating reserve account are liquidated or yield a profit from operations, the proceeds therefrom shall be paid pro rata from time to time as the board of directors may determine, to the holders of such participating certificates, either in cash or by credit upon shares held by such certificate holders in the association; *provided*, that if the association shall make any advances for the purpose of maintaining or preserving any of the assets transferred to the participating reserve account, the proceeds of such liquidation or profits from operation shall be first applied toward the repayment of such advances.

[17:12-109.] A liquidating corporation created pursuant to paragraph "e" of section 17:12-107 of this Title shall be formed as follows: A majority of the board of directors of the association in reorganization shall, as incorporators, sign a certificate which shall set forth:

a. The name of the liquidating corporation, which may be the same as that of the reorganized association with the addition of the words "liquidating corporation," or such other name as the plan of reorganization shall provide;

b. The location of the principal office of the liquidating corporation;

c. The purposes for which the corporation is formed, which shall be limited to the liquidation of the assets transferred to it pursuant to paragraph "e" of section 17:12-107 of this Title;

d. The name and address of the agent in charge of the principal office of the corporation upon whom process may be served.

[17:12-109.1.] An association created pursuant to paragraph "j" of section 17:12-107 of this Title shall be organized in the manner provided by sections 17:12-3 and 17:12-4 of this Title, except that the certificate of incorporation shall be signed by nine members of the reorganizing association who shall be designated in the plan of reorganization as incorporators, and except that the certificate of incorporation need not state the number of shares subscribed for by each incorporator, nor the number of shares to be subscribed for before the association shall begin business, and except further, that the commissioner may forthwith approve the certificate of incorporation without prior notice, hearing or publication. An association so created shall have all the powers and shall be subject to all the limitations prescribed by the provisions of this chapter.

* * * *

(13)

Office - Supreme Court, U. S.
JAN 9 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY IN OPPOSITION TO THE PETITION FOR WRIT OF *CERTIORARI*.

DAVID T. WILENTZ,
Attorney General of the State of New Jersey,
Attorney for Respondent, Commissioner of Banking and Insurance of the State of New Jersey.
State House,
Trenton, New Jersey.

LOUIS J. COHEN,
Assistant Attorney General,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT COMMISSIONER OF BANKING AND INSURANCE OF THE STATE OF NEW JERSEY IN OPPOSITION TO THE PETITION FOR WRIT OF *CERTIORARI*.

Statement.

A group of shareholders of the Eleventh Ward Building and Loan Association of Newark, New Jersey, the petitioners herein, have, pursuant to *R. S. 17:12-106*, filed a petition dissenting from the plan of reorganization of the association. The dissenters are seventy-five shareholders having investments of $258,937.18 as against a total number of 4717 shareholders with an aggregate investment of $8,488,182.21. The dissenters represent 1.59% of the shareholders in number, and 3.05% of the moneys invested (R. p. 47).

The Commissioner of Banking and Insurance is concerned with the public aspect of the present litigation and its necessary effect upon the program of rehabilitation of building and loan associations generally.

R. S. Title 17, Chapter 12, Article 15, is a link forged by the legislature to bolster and rehabilitate the building and loan structure which was in imminent danger of collapse by reason of the economic depression that befell the state in the year 1929. The economic welfare was at stake. *Veix* v. *Sixth Ward B. & L. Assn.,* (1940) 310 U. S. 32. The public interest directly involved, measured in monetary terms, is staggering. In *Bucsi* v. *Longworth B. & L. Assn.,* 119 N. J. L. 120, at page 127, the Court of Errors and Appeals of this state judicially noticed that:

> "* * * a large percentage of all persons in this state over the age of twenty-one are members of building and loan associations and that assets and holdings of building and loan associations approximate, if they do not exceed, one billion dollars ($1,000,000,000)."

The instant plan of reorganization is the culmination of the combined efforts of the Commissioner of Banking and Insurance, the officials of the Federal Savings and Loan Insurance Corporation, the representatives of the Reconstruction Finance Corporation, and the members of the Federal Home Loan Bank Board. It is the form employed by approximately 45 associations which heretofore reorganized in this state (R. p. 39).

ARGUMENT.

POINT 1.

Building and Loan Associations are *quasi-public* corporations affected with a public interest.

The public character of building and loan associations was emphasized in recent decisions of this Court. They are *quasi-public* in nature and are affected with a public interest. *Veix* v. *Sixth Ward B. & L. Assn., supra; Hopkins Federal Savings and Loan Assn.* v. *Cleary,* (1935) 296 U. S. 315; *Treigle* v. *Acme Homestead Assn.,* (1935) 297 U. S. 189.

POINT 2.

Building and Loan Associations are subject to the police power.

Building and loan associations, by reason of their character, are subject to the police power and may be reasonably regulated and controlled by legislative action. *Veix* v. *Sixth Ward B. & L. Assn., supra; Treigle* v. *Acme Homestead Assn., supra; Home Bldg. & Loan Assn.* v. *Blaisdell,* (1934) 290 U. S. 398.

The police power in the instant case was exercised for an end in fact public, and the means adopted were reasonably adapted to the accomplishment of that end. *Doty* v. *Love,* (1934) 295 U. S. 64; *Timmons* v. *Security Savings Bank of Marshalltown,* (1936) 299 U. S. 503, rehearing de-

nied 299 U. S. 621; *Gibbes* v. *Zimmerman,* (1933) 290 U. S. 326.

Private rights must yield to the proper exercise of the reserved power of the state. *Veix* v. *Sixth Ward B. & L. Assn., supra; Doty* v. *Love, supra; Home Bldg. & Loan Assn.* v. *Blaisdell, supra.*

POINT 3.

Petitioners were afforded a hearing.

Petitioners' contention that no "hearing" was afforded them upon their petition filed, lacks foundation in fact. The introduction of relevant and material evidence was permitted; the introduction of inadmissible evidence was denied. (R. pp. 138-141.) Testimony was taken with the privilege of cross examination allowed and exercised. (R. pp. 157-187; 220-242.)

An order allowing proof was entered (R. pp. 138-141).

Petitioners may not complain here of the action of the court in refusing to permit testimony concerning matter which was deemed inadmissible. The Court stated:

> "* * * the proffered evidence so far as it was revealed, would have been clearly inadmissible."
>
> *(In re Eleventh Ward B. & L. Assn.,* 130 N. J. Eq. 414.) (R. p. 267.)

This judicial action deprived petitioners of no constitutional right, nor were they denied a "hearing" within the meaning of the Fourteenth Amendment. No federal question is presented.

POINT 4.

Petitioners were not deprived of their property without due process of law.

The statute and the provision of the plan of reorganization permitting the crediting of the book value of shares pledged to secure mortgage loans against the principal amount of such loans in reduction thereof, does not violate the Fourteenth Amendment.

The crediting of full share values in reduction of mortgage loans in such reorganization is common practice and regarded as good financing. (R. p. 164.) Share insurance being an essential term of, was incorporated in, the plan of reorganization. The Federal Savings and Loan Insurance Corporation considers such practice essential to sound home financing, and requires the allowance of said credits as a prerequisite to its granting of share insurance. (R. p. 160.)

Such practice places all mortgages on a sound investment basis. The mortgagor's burden is lessened, and common benefit is enhanced through the avoidance of defaults and foreclosures.

The Court determined from the factual situation presented that:

> "Here the need for 'direct reduction' was found; and the finding is factually well-grounded."
>
> *(In re Eleventh Ward B. & L. Assn, supra.)* (R. p. 265.)

The plan of reorganization is reasonably adapted to accomplish the public end sought by the legislative policy. The particular provision here considered relative to the recasting of mortgage loans is a component and integral part of the plan heretofore determined as a whole to be fair and equitable.

Direct reduction of mortgage loans is authorized under the association's constitution (R. p. 191). It was the common practice to "recast" loans pursuant to this authority. The association now holds but 28 "sinking fund" mortgages sought to be recast. It has "straight reduction" mortgages totaling $1,818,645.61, most of which were originally "sinking fund" mortgages, "recast" on the same basis as provided in the plan of reorganization and now sought to be applied to the 28 mortgages.

The total share capital of the association is $8,488,-182.21. Petitioners' shares aggregate $259,937.68. The value of the shares pledged to secure the 28 "sinking fund" mortgages is $62,459.51. (R. pp. 192-193.) Petitioners' contention is that but 45% thereof, or $34,352.77, should be credited. This would allow a difference of $28,106.84 to be participated in by all members; affecting petitioners to the combined total extent of $1,052.27 (R. pp. 182-183). Constitutional objection may not be interposed on this score. *Doty* v. *Love, supra.*

The instant plan of reorganization is in no sense arbitrary or oppressive. It is designed to serve the public in a field indisputably affected with a public interest, and all its provisions, including the one presently considered, assume the category of means reasonably adapted to the end

sought. *Doty* v. *Love, supra; Veix* v. *Sixth Ward B. & L. Assn., supra; Home Building & Loan Assn.* v. *Blaisdell, supra.*

Conclusion.

There is want of a substantial federal question. The validity of a state statute is not in question, within the meaning of Section 237 (b) of the Judicial Code, and jurisdiction of this Court should not be invoked.

It is therefore respectfully urged that the application of petitioners for a writ of *certiorari* be denied.

Respectfully submitted,

David T. Wilentz,
Attorney General of the State of
New Jersey,
Attorney for Respondent, Commissioner
of Banking and Insurance of the State
of New Jersey.

Louis J. Cohen,
Assistant Attorney General,
Of Counsel.

(19)

JAN 9 1942

CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT, THE ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

HALSEY W. STICKEL,
Attorney for Respondent, Eleventh Ward Building & Loan Association of Newark, N. J.
1180 Raymond Boulevard,
Newark, New Jersey.

FRED G. STICKEL, JR.,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

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IN THE MATTER

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THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT, THE ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

I.

Statement of the Case.

The impact of the depression upon the building and loan associations of New Jersey, recognized or referred to in *Bucsi* vs. *Longworth Building & Loan Association*, 119 N. J. L. 120; *Veix* vs. *Sixth Ward Building & Loan Association*, 123 N. J. L. 356 and in *Veix* vs. *Sixth Ward Building & Loan Association*, 310 U. S. 32 at page 37, resulted in the creation of the plan of reorganization involved in this proceeding (R. pp. 36, 37, Par. 2).

It was devised by the Commissioner of Banking and Insurance of New Jersey, the New Jersey Building and Loan League, Federal Savings and Loan Insurance Corporation,

Federal Home Loan Bank of New York and the Reconstruction Finance Corporation, and at the time the Eleventh Ward Building & Loan Association management adopted it to solve its condition, had been successfully applied to many similar associations and approximately $31,000,000 made available to shareholders of New Jersey (R. pp. 37, 38 and 39, Par. 3, 4, 5, 6 and 7; pp. 43 and 44, Par. 5; pp. 155 and 156).

The plan is fully described in paragraph 6-12 inclusive on pages 44-47 of the Record, to which reference is respectfully prayed. Also paragraphs 3-5 inclusive on pages 37-39 of Record and pages 70-111.

The Reorganization Act of 1937 was the first and essential step taken to enable such plan to be applied to the New Jersey Associations (R. pp. 38 and 39, Par. 4 and 5).

The plan having been worked out with the above agencies was submitted to the Commissioner of Banking and Insurance who approved it and authorized its submission to the members of the Association (R. pp. 113 and 114, Testimony, R. pp. 224, ll. 39 and 40; p. 225, ll. 1-12; p. 230, ll. 30-40; p. 231, ll. 1-9).

The membership of the Association was 4717 with shareholdings of $8,488,182.21 (R. p. 47, Par. 13, ll. 23-27).

On June 18, 1940, 75 members of the Association with shareholdings of $258,937.18, 1.59% of the total number of shareholders and 3.05% of the total share liability (R. p. 47), elected to take advantage of one method given by the Reorganization Act with respect to a plan submitted thereunder, to wit, the dissent remedy (See R. S. 17:12-106.) (R. p. 20).

On June 24, 1940, the special meeting of the Association shareholders was held and the plan approved by the shareholders (See opinion of Vice-Chancellor Bigelow, R. p. 128, ll. 1-11).

On the 31st day of October, 1940, the Court of Chancery, with certain modifications in detail, approved the plan of reorganization as fair and equitable. (R. p. 253.)

On September 19, 1941, the decree of the Court of Chancery was affirmed by the Court of Errors and Appeals and the Remittitur and Decree of Affirmance filed October 3, 1941. (R. p. 275.)

II.

Questions to Be Considered.

Rule 38 of this Court provides that:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

The petition under Section B is apparently petitioner's compliance with this rule.

However, although the question there raised is whether the petitioners "were afforded a hearing within the meaning of the Fourteenth Amendment," the brief in support of the petition in paragraph 3a page 7, apparently relies upon the rejection by the Court of certain proffered proof as indicating not that they did not have a hearing but that they did not get that "full" hearing which petitioners conceive they should have had. Nevertheless, in Point A of the

Argument, page 9 of the Brief, petitioners state that they propose to claim that there was "no hearing", that they were prevented from introducing material evidence and that they were "given no opportunity to cross examine witnesses".

As we interpret the position of the petitioners, it is that they did not get the kind of a hearing which they now consider they should have been afforded. And on that basis, while we do not think it falls within the question presented in B 1a, page 4 of petitioner's brief, we shall proceed with our argument. The petition does not indicate specifically the section of the Fourteenth Amendment alleged to have been violated. We assume counsel relies upon the due process section. The particular right, privilege or immunity should have been set up. *Mutual Life Insurance Co.* vs. *McGrew*, 188 U. S. 291.

ARGUMENT.

Summary of Arguments.

POINT A. The Court of Chancery discharged its duty to "hear and dispose" "summarily", as required by the statute, those issues properly raised by the petitioners; the petitioners actively and without objection participated therein and took the benefits thereof, including the exercise of the right of cross examination, while the proferred evidence was not arbitrarily refused but rejected as inadmissible because immaterial, not founded upon a specific dissent, waived, or too late. No federal question is involved in the action of the New Jersey Courts.

POINT B. The claim that the petitioners were deprived of their property without due process of law because borrowing members of the Association are alleged to have been preferred over the petitioners, is not now available to them because not founded upon a dissent as required by the statute; it was, nevertheless, disposed of but on a non-federal ground; and in any event, the federal question sought to be reveiwed is not substantial.

POINT A.

The petitioners were given the hearing prescribed by the state statute, actively and without objection participated therein and cannot now complain.

A full hearing was afforded petitioners. The determination of the Court was based upon the pleadings and upon affidavits filed as well as upon the proofs submitted. Witnesses were called and examined both on direct and cross.

On July 24, 1940, pursuant to order to take proofs and without objection on the part of the petitioners, testimony was taken not *ex parte* and not only as to proof sought by the Association (as alleged in petitioner's brief, p. 3, ll. 10 and 11) but in the presence of counsel for the petitioners who exercised his right of cross examination, and who brought about the introduction through stipulation and exhibit of desired proof (R. pp. 186, 187, Exhibit S-4 p. 194, Exhibit S-3, pp. 192, 193 and p. 182, pp. 157-186).

On July 29, 1940, upon the continuance of the hearing, counsel for the petitioners announced that "In lieu of

further proofs in this case counsel desire to put in this stipulation." (R. p. 187.) This stipulation contains facts desired to be established by the petitioners (R., p. 194).

And again counsel for petitioners, on July 29, 1940, far from objecting to procedure stated "There is only one open item," and counsel for the Association promptly offered to supply the desired evidence (R. p. 187).

Upon this record including the said testimony, (R. p. 197, ll. 33 and 34) the Court, on September 23, 1940, made its final decision as to the said plan (R. p. 197).

Thereafter on October 24, 1940, petitioners presented a petition for a continuance and other relief (R. p. 250), which continuance and relief was denied by the Court (R., last paragraph of decree, p. 255).

The petitioners registered no objection to the method of hearing and considering the issues, nor did they claim that the petitioners had been denied the right to cross examine or seek the ruling of the Court on objections to the admission or rejection of testimony.

We submit that the petitioners were not deprived of a hearing or trial, that the Court properly discharged its statutory duty to "hear and dispose," "summarily" of the issues specifically raised by the dissent filed, that no federal question is here involved and no constitutional right of the petitioners was violated. *Hurwitz* vs. *North*, 271 U. S. 40 at page 42 and cases there cited; also *Felts* vs. *Murphy*, 201 U. S. 123; *Twining* vs. *State of New Jersey*, 211 U. S. 78 at page 110; *Pierce* vs. *Somerset Railway*, 171 U. S. 641 at page 648.

Nor were the petitioners prevented from introducing evidence material to the issues.

The interpretation of a State statute and questions of State procedure are determinable by the State Courts and the United States Supreme Court governed thereby. *West vs. Louisiana,* 194 U. S. 258; *Watson* vs. *Maryland,* 218 U. S. 173.

The New Jersey Court of Errors and Appeals construing the statutory remedy of dissent conferred by the Reorganization Act said that specification and particularization were of the essence of the statutory scheme. R. 259, first paragraph.

The Court did not arbitrarily refuse to take testimony but ruled on the admissibility of evidence, purely a matter of state practice and procedure. The rejection of the proferred evidence was based upon either immateriality, lack of a specific dissent as required by the statutory scheme, waiver, failure to register an adequate objection, or untimeliness of proffer. (R. p. 258, ll. 12-28; 259, ll. 26-40; 261, ll. 1-19; p. 270, ll. 29-38; 270, ll. 15-20; 269; ll. 7-10; 266, ll. 30-35.) All involve questions not here reviewable. *Arrowsmith* vs. *Harmoning Admrx.,* 118 U. S. 194, at pages 195 and 196; *American Railway Express Company* vs. *Kentucky,* 273 U. S. 269, 273; *Bell Telephone Co. of Penn.* vs. *Pennsylvania Public Utility Commissioner,* 309 U. S. 30; *Western Union Telegraph Co.* vs. *Wilson,* 213 U. S. 52, 54; *Chapman, Etc. Land Co.* vs. *Bigelow,* 206 U. S. 41, 45; *Franklin* vs. *South Carolina,* 218 U. S. 161.

Nor were petitioners denied the opportunity to cross examine witnesses.

They in fact were given that right and exercised it as hereinbefore demonstrated.

They at no time in the Court below or by way of a proper ground of appeal raised that question nor was it argued before or passed upon by the Court of Errors and Appeals. *Mutual Life Insurance Co.* vs. *McGrew, supra.*

The constitutional rights of the petitioners were carefully respected by the Courts of New Jersey.

POINT B.

The Plan of Reorganization in providing for the crediting of book value to borrowing members to be credited on their bond and mortgage, does not violate the Fourteenth Amendment.

Paragraphs a and c are the portions of the plan specifically involved in the claim. (See R. pp. 76 and 77.)

The constitution and by-laws of the Association authorized the directors to allow such a credit, (R. p. 191), and all but 28 of the Association's mortgages had, prior to the presentation of the plan of reorganization been recast to allow such a credit. The mortgages so recast into "straight reduction" mortgages amounted to $1,848,645.61, and the mortgages that would be recast as the result of the plan amounted to $127,500.00, secured by shares having a present value of $62,459.51. (R. pp. 180-183, Ex. S-3, pp. 192, 193.)

The reasons for such crediting, the essentiality thereof if reorganization is to take place and the aid of the federal agencies secured and the alternative for the Association if such aid is not secured is set forth in the record. (R. Par. 2, pp. 48 and 49; Par. 6 and 7, pp. 51 and 52; Par. 8, p. 40; R. pp. 160, 161, 162, 163, ll. 39 and 40, 164 ll. 1-23.)

Were the borrowing members to be given a credit of but 45% the extent to which the petitioners would be affected would be $1,052.27, a cheap price indeed for the compensating benefits of the plan. (R. pp. 182 and 183.)

Here is not a preference but rather the agreement by the Association to grant a credit to 28 borrowing members such as the Association could have granted anyway and did grant to many other borrowing members as the result of which three million is made available to the petitioners and their fellow saving members, plus share insurance and a reorganized association able to serve the community.

Here is a mere recognition of the dual relationship of the member borrower to the Association and an equitable adjustment of both relationships in the common good.

The situation falls squarely within the reasoning, principles and decision in the case of *Doty* vs. *Love*, 295 U. S. 64, 69, 71, 72, 74, where a preference to the holders of small claims was upheld as was a release of shareholders from personal liability. See also 99 Amer. Law. Rep. 1220 for a number of cases where closed banks were reorganized under plans assented to by depositors representing seventy-five per cent of all debts, exclusive of depositors of less than twenty-five dollars, and at page 1226 and 1227 for cases involving plans approved despite preferential payments to small depositors.

Matters like this lie in sound judgment and not in the realm of the constitutional. *State* vs. *Title Guaranty & Trust Co.*, 177 Atl. 617, at pages 623, paragraph 11; 99 A. L. R. 1205.

We are dealing here as this Court said in *Veix* vs. *Sixth Ward Building & Loan Association, supra,* "With financial institutions of major importance to the credit system of the State;" and the Reorganization Act like the statute under review in the *Veix* case, "was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations," page 37 of *Veix* case.

The law as applied by our New Jersey Courts was in complete harmony with the principles of that legal landmark, *Home Building and Loan Association* vs. *Blaisdell,* 290 U. S. 398, and of *Veix* vs. *Sixth Ward Building & Loan Association, supra; Gibbes* vs. *Zimmerman,* 290 U. S. 326, 332, and *Campbell* vs. *Allegheny Corporation* (C. C. A. 4th 1935), 75 Fed. (2d) 947 at page 954. (Writ of *Certiorari* denied in 1935, 296 U. S. 581). See also *Timmons* vs. *Security Savings Bank of Marshalltown,* 221 Iowa, 102, 264 N. W. 708; 299 U. S. 503, rehearing denied 299 U. S. 621; *Newman* vs. *Asbury Park & Ocean Grove Bank,* 120 N. J. L. 122, which lays down the formulae for reorganization of financial institutions in New Jersey; *Day* vs. *Palisade Building & Loan Association,* 124 N. J. Eq. 1, a decision upholding the constitutionality of statute and plan here involved; *Corstvet* vs. *Bank of Deerfield,* 263 N. W. 687. The constitutional question, if it exists at all, is not substantial in character under the circumstances present. Rule 38, Paragraph 5a.

The claim of unconstitutional preference here made was disposed of on a non-federal ground in the Court of Errors and Appeals.

There petitioners contended that "a blanket provision for granting such credits, without regard to necessity, affects only private rights and is not essential to fulfillment of a public purpose," and therefore violated the Fourteenth Amendment (R. p. 263, ll. 7-11).

But the Court found that "The rehabilitation of associations so circumstanced" (frozen and unable to function as the Association in question was) "indubitably serves the common good and welfare" (R. p. 264, ll. 12-14), that "Continued function is of the essence of the statutory scheme" (R. p. 264, ll. 36-37), and that "*the need for 'direct reduction' was found; and the finding is factually well grounded*" (R. p. 265, ll. 14-16). (Italics ours.) Such a finding of fact is not subject to re-examination by this Court. *Louisville & Nashville R. R. Co.* vs. *Schmidt*, 177 U. S. 230, 237. *Lynch* vs. *People of N. Y. ex rel Pierson*, 293 U. S. 52. Moreover, no dissent supported this objection in the Court below as required by statute.

Paragraph 2a of the dissent (R. p. 23) objects to the provision in question but not as violative of the Fourteenth Amendment. The objection obviously is designed to show that the plan is inequitable and unfair, not that it is unconstitutional. This is insufficient specification as the Act was construed by the Court of Errors and Appeals.

The dissent which raises the constitutional question is Paragraph 4 (R. p. 26), and the question there raised is not here in question.

To grant the prayer of petitioners would as a practical matter confer upon them that vested right in a method of liquidation, the existence of which this Court has emphatically denied. *Doty* vs. *Love, supra.*

It is respectfully submited that a writ of *certiorari* should not be granted.

Respectfully submitted,

HALSEY W. STICKEL,
Attorney for Respondent,
Eleventh Ward Building & Loan
Association of Newark, N. J.

FRED G. STICKEL, JR.,
Of Counsel.

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No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

REPLY BRIEF OF PETITIONERS.

JEROME C. EISENBERG,
Attorney for Petitioners,
744 Broad Street,
Newark, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

A.

Statement.

The New Jersey statute here involved (Petitioners' main brief, App., p. 15, *et seq.*) designates the Commissioner of Banking and Insurance of New Jersey as an "aggrieved" person for the purposes of appeal from any order made by the Court of Chancery approving or disapproving a plan of reorganization. R. S. 17:12-106 (Petitioners' main brief, App., p. 17). For that reason, service of the petition for Writ of *Certiorari* and of the petitioners' brief in support thereof, was made upon the Commissioner of Banking and Insurance (hereinafter called the Commissioner) as well as upon the respondent Association. Both the Commissioner and the Association have filed briefs.

This brief will reply to both briefs under one cover, to eliminate the use of an extra book by the Court.

I.

Both briefs emphasize the fact that the petitioners have investments of about $258,000 out of an aggregate investment in the Association of $8,488,182; that the petitioners represent 1.59% of the total number of shareholders, and 3.05% of the total monies invested.

The argument on the amount of money invested by the petitioners in comparison to the total sums invested, seeks to prejudice the petitioners. It is immaterial.

The statute (Petitioners' main brief, App., p. 16) imposes the duty of active dissent upon members of the Association. It requires that the dissent be served upon the Association, and filed in the Court of Chancery at least five days before the date of the meeting of members called to consider and vote upon the Plan. The Record discloses that the Association deluged its members with copies of the Plan, "follow-up" letters (R. pp. 121, 122), proxies (R. pp. 118-121) and requests to return proxies (R. pp. 69-70). The Plan is an intricate, technical, and highly complex document. The average small investor could not be expected readily to understand the workings of the Plan and all its implications. The average small investor, noticing a call for a meeting, would naturally be disposed to suspend his judgment on the Plan until the meeting. If he did nothing and attended the meeting in search of information, he would find that, if he objected to any part of the Plan, it would be too late to make an effective dissent. His vote at the meeting would be futile.

Small investors are entitled to their day in court. In *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, Mr. Justice Douglas said (at p. 115):

> "Hence, in this case the fact that 92.81% in amount of the bonds, 99.75% of the Class A stock and 90% of the Class B stock have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of a large bond issue."

The emphasis laid, by the Commissioner and by the Association, upon comparative investments is immaterial. It is part of the coercion to which the petitioners were subjected in the courts below. The Court of Chancery said (R. p. 127, l. 35, *et seq.*):

> "Counsel for the Association reiterates that the Plan of Reorganization has been approved by the Commissioner of Banking and Insurance, and representatives of the Reconstruction Finance Corporation, the Federal Home Loan Bank and the Federal Savings and Loan Insurance Corporation as well as by the Board of Directors and an impressive majority of the shareholders of the Eleventh Ward Building and Loan Association."

The Court of Errors and Appeals said (R. p. 260, ll. 27-32):

> "In determining whether the proposal is 'fair' and 'equitable' in this behalf, it is not without significance that appellants comprise 1.57% of the total membership, and represent but 3.05% of the share liability of the association."

The same oppression is evidenced by the emphasis laid in the courts below, and again laid here by the Commis-

sioner and the Association, that the Plan is the result of the combined "efforts" of the Commissioner, the New Jersey Building and Loan League, the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank of New York, and the Reconstruction Finance Corporation. At every step in this case, the petitioners have been faced with the obvious attempt on the part of the Commissioner and the Association to impress the courts with the array of institutions whose judgment is sought to be imposed upon the petitioners. The petitioners object to being involuntary and forcibly inarticulate guinea pigs for the "experiments" of the Federal Home Loan Bank of New York, the Reconstruction Finance Corporation, the Federal Savings and Loan Insurance Corporation, and the Commissioner. If they are to be guinea pigs, they want their day in court and the opportunity to submit, for the serious consideration of the court, material in opposition to the arguments advanced by these agencies. The will of the majority as determined by their "experiments" should not be forced upon the minority simply because of the difference in numbers and the weight of the combined federal and state agencies. Submission to coercion is not the application of fair and equitable standards. The petitioners object to the paternalism of the agencies which created a formula, of which they, the petitioners, had no notice, and in the concoction of which they had no voice. They seek to be protected against any incursion of their right not to be "benefited" against their will. They feel that they do not have to be told what to do with their money. By right of might and by means unwarranted and oppressive, the Association and the Commissioner seek to defeat the rights of minority members. This is their last appeal for relief.

Since holders of securities issued by building and loan associations are excluded from the benefits of the Securities Act of 1933, 48 Stat. 74, any financial transaction of the magnitude here involved, proposed by the managers of a building and loan association, should have the protection, for minority members as well as majority members, of the most careful scrutiny of the court charged with the duty of determining the fair and equitable treatment of all the investors affected. The petitioners did not get that scrutiny in the courts of New Jersey.

II.

The Commissioner argues that building and loan associations are *quasi-public* institutions affected with a public interest. This is true, but beside the point.

The petitioners do not deny the validity of the well-established rule that constitutional guarantees must yield to proper exercise of the reserved power of the state. In every case like that here presented, there are two inquiries:

(1) Is the statute constitutional;

(2) Are its provisions constitutionally applied?
Treigle v. *Acme Homestead Association,* 297 U. S. 189.

Both questions must be affirmatively answered before the validity of the Plan is established.

It has been held that the legislature may lawfully alter withdrawal privileges;

Bucsi v. *Longworth Building & Loan Association,* 119 N. J. L. 120;

Rocker v. *Cardinal Building and Loan Association*, 119 N. J. L. 134;
Veix v. *Sixth Ward Building and Loan Association*, 310 U. S. 32;
Sommer v. *Workingmen's Building and Loan Association*, 17 N. J. Mis. R. 267, affirmed 125 N. J. L. 83.

These cases all go on the ground that it is competent for the legislature to control withdrawal demands to prevent ruinous liquidation of building and loan association assets through forced sales. There can be no quarrel with either the result or the reasoning.

It is one thing, however, to conserve assets from forced liquidation, and it is an entirely different thing to provide the means for continuance of business for all purposes. The first purpose is a public one; the latter purpose is not. There is no connection between the two.

There is no proof that reorganization is the sole alternative to "forced" liquidation. As a matter of fact, the cases cited above have made the "forced" liquidation of a building and loan association a virtual impossibility in New Jersey. There is no proof that anything deleterious would happen to the State of New Jersey, the people of New Jersey, the members of the respondent Association, or to anybody, if the respondent did not reorganize. There is no proof that anything would happen if the respondent Association did nothing by way of reorganization or liquidation. The respondent Association had not closed its doors; it had not suspended business; it was managing its own affairs.

It is not necessary to the economic life of the state that it have *new* building and loan associations. They do not perform the functions of banks. They achieve the status of corporations affected with a public interest simply because of the magnitude of the combined funds invested in them, and not because of any peculiar public function exercised by them. They are convenient instrumentalities, but not essential ones, like insurance companies or banks. The petitioners offered proof (R. pp. 140, 250, 251) that those associations now functioning in Newark, New Jersey, are having difficulty in finding safe outlets for investment. The petitioners offered proof that Newark, New Jersey, the community in which the Association is located, is already adequately serviced by other institutions which perform a like service (R. pp. 140, 251). The courts below refused to listen to these offers.

It is a mixed question of law and fact whether a statute is in fact enacted for a public end. In *Treigle* v. *Acme Homestead Association, supra,* this Court said:

> "But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. Though the obligations of contract must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, *it must be exercised for an end which is in fact public and the means adopted must*

be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive." (Italics supplied.)

The petitioners were denied the right to prove the fact that the statute was not enacted for an end which was in fact public. They were denied the right to introduce evidence to prove that the provisions of the statute were not applied in a manner to achieve an end which was in fact public (R. p. 138).

III.

The Commissioner's argument that building and loan associations are subject to the police power begs the basic question.

The Commissioner relies upon *Veix* v. *Sixth Ward Building and Loan Association, supra; Treigle* v. *Acme Homestead Association, supra,* and *Bucsi* v. *Longworth Building and Loan Association, supra,* as conclusive evidence that building and loan associations are subject to the police power and may be reasonably regulated and controlled by legislative action. *The statute in question is not a statute enacted to regulate building and loan associations.* It was enacted to create *new* associations.

The statute here attacked belongs to that class of legislation which is constitutional only if it has a factual basis justifying it. Where that factual basis is challenged, a proper case for judicial inquiry is made out.

United States v. *Carolene Products Co.*, 304 U. S. 144;
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194.

The petitioners did not get a judicial inquiry. They offered to prove (R. p. 140) that *new* "reorganized" associations in New Jersey have loaned their funds to persons who are only technically members; they do not share in profits nor do they participate in losses. They offered to show that the funds of the *new* reorganized associations are for the most part not realized from contributions made by members but are derived from loans made by governmental or other agencies. They offered to show (R. pp. 140, 141) that *new* reorganized building and loan associations are unable to invest their funds in mortgage loans in a normal manner and that they have been driven to wholesale purchase of mortgages from other corporations. They are artificially created and artificially stimulated by huge loans. Their operation is such that now there are virtually no differences between building and loan associations and private money-lending institutions. Once again the argument revolves around the offer of the petitioners, made and denied below, to introduce evidence below to determine whether the statute was enacted for a public end and whether public or only private rights were involved. Their offer was denied.

IV.

Both the Commissioner and the Association argue that the petitioners were given a hearing; the record refutes the argument.

Both briefs point to the fact that an order allowing proofs was entered (R. pp. 138, 141). The same order denied the petitioners leave to submit the proofs. The order denied, in the first instance, the right of the petitioners to *attempt to introduce* the proof. This is different from a ruling on the admissibility of evidence.

The refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution.

> *Georgia Railway & Electric Co.* v. *Decatur*, 295 U. S. 165, 171;
> *Morgan* v. *United States*, 298 U. S. 468;
> *Baltimore and Ohio Railroad Co.* v. *United States*, 298 U. S. 349.

Ordinarily rulings on the admissibility of evidence are concededly not subject to review by this Court. Here the matter was not one of admissibility of evidence but on the right to prove a case.

It is clear from the order referred to, and from the opinion of the Court of Errors and Appeals, that both the Court of Chancery and the Court of Errors and Appeals did not consider inquiry into the questions raised as being the subject of proof. Both courts begged the very question of the right of inquiry. This is not due process.

The limited proofs permitted did not constitute the full hearing required by the due process clause. No judge, no referee, no special master, no agent of the court listened to the evidence. The court did not rule on any question of evidence as to the proofs which were taken; the court did not dispose of the objections made. This was not due process. Due process requires a full hearing which is the *hearing of evidence* and argument.

V.

Both the Commissioner and the Association argue that the petitioners had a hearing because certain testimony was taken. The Record discloses that the hearing was a limited one and not before the court, or judge, or referee, or special master, or examiner.

The testimony printed on pages 218-242 of the Record was not given before the court (Vice-Chancellor Bigelow) or any judge or special master. Counsel for the Commissioner said (R. p. 219, ll. 25-35):

> "* * * I, in behalf of the Commissioner, and with Mr. Stickel concurring in behalf of the Eleventh Ward Building and Loan Association, suggested to the Court it is quite probable that Mr. Eisenberg would wish to cross examine the affiants, and if that was the case we had no objection. Whereupon the Vice-Chancellor said that was quite alright. There is no order of the Court directing that the affiants be cross examined. It is a voluntary act on behalf of counsel."

The testimony printed on pages 157-187 of the Record was not given before the Court (Vice-Chancellor Bigelow) or any person designated by him. There were numerous objections made to the testimony throughout. These objections were never ruled upon by the Court.

VI.

The Commissioner and the Association argue that the statute and the plan in providing for the crediting of book value to borrowing members without a similar treatment to

non-borrowing members does not violate the 14th Amendment. Their briefs admit the preferential and discriminatory treatment given borrowing members.

The Association argues (Association's Brief, Point B, pp. 8, 9) that "The constitution and by-laws of the Association authorized the directors to allow such a credit * * *" also that "Were the borrowing members to be given a credit of but 45% the extent to which the petitioners would be affected would be $1,052.27, a cheap price indeed for the compensating benefits of the plan". This is an admission of fact.

The Commissioner's argument is (Commissioner's Brief, p. 5) that "The crediting of full share values in reduction of mortgage loans in such reorganization is common practice and regarded as good financing". The Association's argument (Association's Brief, p. 9) is that "Here is not a preference but rather the agreement by the Association to grant a credit * * *". While the Commissioner and the Association both admit the fact, both deny the preference; one for the reason that it is "common practice" and the other by the statement that it is not a "preference" but rather the "agreement by the Association to grant a credit". Thus we have an admission that members of the Association were treated differently; the members who owed money to the Association on mortgages received full credit for their dues paid; the petitioners who were non-borrowing members received credit of but 45% of their dues paid in.

Such a preference in a proper case may be unobjectionable. It is objectionable, however, where it has no rational

basis. Such a basis is lacking here. It is concededly arbitrary (R. p. 171, ll. 13-27). It is conceded in the briefs here. It is invalid in the statute and it is invalid in the Plan.

Conclusion.

It is respectfully submitted that this Honorable Court should exercise its power to preserve to the petitioners their rights under the Constitution of the United States.

Respectfully submitted,

JEROME C. EISENBERG,
Attorney for Petitioners.

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